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IN THE

Supreme Court of the United States

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP AND WILLIAM VON WINKLE,

Petitioners,

v.

CITY OF NEW LONDON AND NEW LONDON DEVELOPMENT CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

BRIEF OF *AMICUS CURIAE* K. HOVNANIAN COMPANIES, LLC IN SUPPORT OF RESPONDENTS

PAUL H. SCHNEIDER
Counsel of Record
AFIYFA H. BOLTON

GIORDANO, HALLERAN & CIESLA, P.C.

125 Half Mile Road, P.O. Box 190
Middletown, New Jersey 07748
(732) 741-3900

Attorneys for Amicus Curiae
K. HOVNANIAN COMPANIES, LLC

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Middletown, New Jersey 07748
(732) 741-3900

Attorneys for Amicus Curiae
K. HOVNANIAN COMPANIES, LLC

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INTERESTS OF *AMICUS CURIAE*

The parties to this case have filed letters with the Clerk of the Court consenting to the filing of *amicus curiae* briefs in this matter.[1]

K. Hovnanian Companies, LLC ("K. Hovnanian") is a leading national homebuilder that has housed over 145,000 families in the United States. K. Hovnanian operates in the States of New Jersey, New York, Pennsylvania, Maryland, Virginia, West Virginia, Ohio, North Carolina, South Carolina, Texas, Arizona, Florida and California.

K. Hovnanian is the largest homebuilder in the State of New Jersey, a densely populated State with limited availability of undeveloped land on which to house a growing population. New Jersey's response to these circumstances – identifying "area[s] in need of redevelopment" and enabling private companies such as K. Hovnanian to provide housing and other economic opportunities in such areas – illustrates that in appropriate circumstances, the use of eminent domain for so-called "private economic development" satisfies the public use requirement of the Fifth Amendment's Takings Clause.

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[1] Pursuant to Rule 37.6 of this Court, *amicus curiae* state that their counsel authored this brief and *amicus curiae* paid for the preparation of this brief. This brief was not written in whole or part by counsel for a party, and no one other than *amicus curiae* made a monetary contribution to its preparation.

SUMMARY OF THE ARGUMENT

New Jersey is the most densely populated state in the nation. Due to environmental constraints, New Jersey has a limited availability of undeveloped land on which to provide housing and on which to address employment and the other needs of a growing population. The State has adopted a policy of "smart growth," which seeks to address these public needs while conserving natural and environmental resources by promoting development in areas without significant environmental constraints, and by encouraging redevelopment and revitalization in areas that are already developed. A key component of this strategy is New Jersey's Local Housing and Redevelopment Law, which addresses the public's need for housing, jobs, and economic development by identifying "area[s] in need of redevelopment," creating plans for the appropriate redevelopment of these areas, and authorizing private parties to implement these redevelopment plans. One element of this redevelopment effort is the use of eminent domain.

While the designation of an "area in need of redevelopment" focuses on redevelopment of blighted areas, the need to provide housing, jobs and other economic opportunities in a state such as New Jersey may require going beyond the "elimination of blight" in the narrowest sense of that term. New Jersey's experience illustrates that the use of eminent domain for so-called "private economic development" is sometimes necessary in order to provide for essential public needs – housing, jobs, and protection of fragile environmental resources. This Court should reject an overly narrow "elimination of blight" standard for determining whether and

when the use of eminent domain for "private economic development" satisfies the "public use" requirement of Takings Clause of the Fifth Amendment.

LEGAL ARGUMENT

AS THE NEW JERSEY SITUATION DEMONSTRATES, THE USE OF EMINENT DOMAIN TO ENABLE PRIVATE REDEVELOPMENT TO MEET VITAL PUBLIC NEEDS, SUCH AS HOUSING, JOBS, AND OTHER ECONOMIC OPPORTUNITIES, MAY SATISFY THE "PUBLIC USE" REQUIREMENT OF THE FIFTH AMENDMENT'S TAKINGS CLAUSE.

This Court has granted certification to determine the limits imposed by the Fifth Amendment's public use requirement on the condemnation of private property not solely to eliminate slums or blight, but to provide housing, jobs and other economic benefits through "private economic development." This *amicus curiae* contends that in appropriate circumstances, condemnation of private property to enable redevelopment by private parties need not be tied to a narrow requirement of "elimination of blight" in order to pass constitutional muster. Circumstances in a state such as New Jersey demonstrate that condemnation of areas determined to be in need of redevelopment may enable the private sector to provide housing, jobs and other economic opportunities for a growing population faced with a dwindling supply of undeveloped land. The use of condemnation in such circumstances readily satisfies the "public use" requirement.

A. New Jersey is the Most Densely Populated State in the Union.

New Jersey is the most densely populated State in the nation. *N.J. Stat. Ann.* § 52:18A-196 (West 2001 & Supp. 2004) (State Planning Act, legislative findings). As of 2003, there were 1,164 people per square mile in the State of New Jersey. Sen-Yuan Wu, N.J. Dep't of Labor and Workforce Dev., *2003 State Population Estimates* 1, http://www.wnjpin.net/OneStopCareerCenter/LaborMarket-Information/lmi02/stest03.pdf (last modified Oct. 8, 2004). By contrast, the national average was a population of 82.2 per square mile. *Id.* By the year 2025, New Jersey will have a projected population of 1,381.6 per square mile, with an ever increasing density in the ensuing years.[2]

Both the State's Legislature and Courts have recognized the challenges faced by this population density. *See N.J. Stat. Ann.* § 52:18A-196 (West 2001 & Supp. 2004) (State Planning Act, legislative findings); *N.J. Stat. Ann.* § 4:1B-1 (West 1998) (Agricultural Preserve Demonstration Program Act, legislative findings); *N.J. Stat. Ann.* § 13:1E-213 (West 2003) (Clean Community and Recycling Grant Act, legislative history); *N.J. Stat. Ann.* § 40:55D-114 (West 1991), *N.J.S.A. Stat. Ann.*§ 40:55D-138 (West, WESTLAW through L. 2004, c. 1 to 155) (State transfer of development rights to municipality, legislative findings); *N.J. Stat. Ann.* § 55:19-20 (West 2001) (New Jersey Urban Redevelopment Act); *see generally, Aversano v. Palisades Interstate Parkway Comm'n*,

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[2] Calculation based on the projected population in 2025, *infra*, divided by the square mileage of the State of New Jersey.

832 A.2d 914, 930 (N.J. Super. Ct. App. Div. 2003) (Wefing, J., dissenting), *modified on other grounds*, 851 A.2d 633 (2004) (recognition that New Jersey is densely populated); *N.J. Sports & Exposition Auth. v. McCrane*, 292 A.2d 545, 577 (N.J. 1972), *cert. den.*, 414 U.S. 989 (1973) (recognition that New Jersey is the most densely populated State in the nation); *Cappture Realty Corp. v. Bd. of Adjustment, Elmwood Park*, 313 A.2d 624, 630 (N.J. Super. Ct. Law Div. 1973), *aff'd on other grounds*, 336 A.2d 30 (N.J. Super. Ct. App. Div. 1975).

B. New Jersey has a Growing Population.

New Jersey's population continues to grow. As of July 1, 2003, New Jersey's population reached 8,638,396. Wu, *supra* at 1; *see also* U.S. Census Bureau, *State and County QuickFacts*, http://quickfacts.census.gov/ qfd/states/34000.html (last revised on July 9, 2004). The State experienced a 0.7% rate of growth from the 2002 total population of 8,575,252. Wu, *supra* at 1. In 2000, the State's population was 8,414,350. *State and County QuickFacts, supra.* Since the 2000 census, New Jersey experienced an estimated annual increase in population of 0.8%. Wu, *supra* at 2.

Overall, New Jersey is the nation's tenth most populous state in the nation. *Id.* at 1 (citing U.S. Bureau of Census, *Population Division* (Dec. 2003)). From 2002 to 2003, New Jersey had the greatest population growth of any State in the Northeast region, with an increase in population of 63,144, compared to New York and Pennsylvania, which grew by 0.3 percent each from 2002-2003. *Id.* at 2. By the year 2025,

New Jersey's population is expected to increase by more than 18% to 10,250,100. Div. of Labor Mkt. and Demographic Research, N.J. Dep't of Labor and Workplace Dev., *Population, Labor Force, Industry Employment and Occupational Employment Projections for New Jersey*: 2002 to 2012 (Aug. 2004), http://www.wnjpin.net/ OneStopCareerCenter/ LaborMarketInformation/lmi03/highlights.doc; *See* Div. of Labor Mkt. and Demographic Research, N.J. Dep't of Labor and Workplace Dev., *Table 1, Projection of Total Population by Projection Model, New Jersey 1990 to 2025*, http://www.wnjpin.net/OneStopCareerCenter/LaborMarket Information/lmi03/Sptab1.pdf (Aug. 2004).

Foreign immigration is the largest source of New Jersey's population growth. Wu, *supra* at 2. The State ranked 6th among all states in foreign immigration from 2002 to 2003. Wu, *supra* at 2. The net gain of foreign immigration from 2000 to 2003 was 192,044 in population growth. *Id.* at 3. In 2000, 15% of New Jersey's population consisted of foreign born immigrants. Sen-Yuan Wu, N.J., Dep't of Labor and Workforce Dev., *Estimate of Foreign-Born Population in New Jersey*: 2000, http://www.wnjpin.net/OneStopCareer Center/LaborMarketInformation/lmi19/ eifbp.pdf (last revised June 28, 2004). In 2003, New Jersey's foreign born population was 17.5% and growing. *State and County QuickFacts, supra.*

C. New Jersey Lacks the Housing Needed to Shelter its Growing Population.

New Jersey has a growing need for housing. For example, from 1990 to 2000, the growth in the number of housing units did not keep pace with the State's population growth. N.J. State Data Ctr., Div. of Labor Mkt. and Demographic Research, N.J. Dep't of Labor and Workplace Dev., *Housing Units, Households and Families New Jersey, Counties and Selected Municipalities: 1990 and 2000* 4 (Aug. 2001), http://www.wnjpin.net/OneStopCareerCenter/ LaborMarketInformation/lmi25/pub/NJSDC-PH1.pdf. From 1990 to 2000, the State's total housing units increased by 7.6%, compared with the nation-wide increase of 13.3%. *Id.*

New Jersey's lack of an adequate housing supply is attributable to the rise in population growth, the limited availability of land, and the tendency for larger families among foreign immigrants. *Id.* Both the State's Legislature and Courts have recognized that New Jersey suffers from a housing shortage. *See N.J. Stat. Ann.* § 2A:18-61.1 to -61.12 (West, WESTLAW throughl.2004, c. 1 to 155) (Anti-Eviction Act, legislative findings); *224 Jefferson St. Condo. Ass'n v. Paige*, 788 A.2d 296 (N.J. Super. Ct. App. Div.), *certif. den.*, 796 A.2d 896 (N.J. 2002); *Kuzuri Kijij, Inc. v. Bryan*, 852 A.2d 1136 (N.J. Super. Ct. App. Div. 2004).

D. Due to Environmental Constraints, New Jersey has a Limited Availability of Undeveloped Land Suitable for Development.

New Jersey has a limited availability of undeveloped land suitable for development, due largely to environmental constraints. New Jersey has 4.8 million acres of land, of which 1.35 million acres are developed. Ctr. for Urban Policy Research, Rutgers, The State Univ. of N.J., *The Costs and Benefits of Alternative Growth Patters, The Impact Assessment of the New Jersey State Plan* 111 (Sept. 2000). When public park lands, forest lands, preserved farm land, fish and wildlife management areas, and other lands earmarked for preservation are accounted for, fewer than 1 million acres of undeveloped land remain. *Id.* And much of this is environmentally constrained.

The State Planning Commission, in the 2001 State Development and Redevelopment Plan, has designated 833,282 acres as environmentally sensitive planning areas, comprising 17.3% of the land in New Jersey. N.J. State Planning Comm'n, *The New Jersey Development and Redevelopment Plan, Executive Summary* 34 (Mar. 1, 2001). Of that, 127,892 acres are developed, 338,904 acres are unprotected and undeveloped land, 139,446 acres are preserved, and 223,139 acres are environmentally sensitive and unsuitable for development under the State Development and Redevelopment Plan. *Id.* Lands in the environmentally-sensitive planning areas are so designated due to wildlife habitats, geological features and sensitive ecosystems. *Id.* In addition, the State Development and Redevelopment Plan has designated rural/environmentally sensitive planning areas comprised of 395,400 acres, which is 8.2% of New Jersey's

land. *Id.* at 34. Of that land, 57,721 acres are developed, 255,887 acres are unprotected and undeveloped, 39,141 acres are preserved, and 42,651 acres are unsuitable for development. *Id.*

Additionally, the Legislature has recognized that there are various regions of the State with sensitive environmental features that warrant special protection. For example, earlier this year the Legislature enacted the Highlands Water Protection and Planning Act. *N.J. Stat. Ann.* § 13:20-1 (West, WESTLAW through L.2004, c. 1 to 155), *et seq.* The Legislature recognized that the "portion of the national Highlands Region contained within the State of New Jersey is nearly 800,000 acres, or about 1,250 miles." *N.J. Stat. Ann.* § 13:20-2 (West, WESTLAW through L.2004, c. 1 to 155). The Highlands region contains thirteen percent of the land in New Jersey. *Id.* Of this, the 139,446 most critical acres have been designated as the "Highlands Preservation Region" in which development is severely limited in order to protect the water supplies for the State's urban population centers. The New Jersey Highlands are part of the interstate Highlands Region that also extends into Pennsylvania and New York. The United States Department of Agriculture Forest Service, and recently the United States Congress, have recognized that the Highlands Region is of special environmental significance because it ensures clean and plentiful drinking water for the citizens of the region, and provides other natural resources including "clean air, contiguous forest lands, wetlands, pristine watersheds and habitat for fauna and flora." *Id.*; Highlands Conservation Act, H.R. 1964, 108th Cong. (2004).

Congress has also recognized the national significance of the New Jersey Pinelands, and has encouraged State preservation efforts. National Parks and Recreation Act of 1978, 16 *U.S.C.A.* § 471i (West 2000). In response, the New Jersey Legislature enacted the Pinelands Protection Act. *N.J. Stat. Ann.* § 13:18A-1 (West 2003) *et seq*. The pinelands area contains important surface and ground water resources and provides a habitat for "rare, threatened and endangered plant and animal species" and other "special natural, ecological, agricultural, scenic, cultural and recreational resources." *N.J. Stat. Ann.* § 13:18A-2 (West 2003). The pinelands area comprises approximately 1.1 million acres, approximately 22% of the land in the State, with a core preservation area of 295,000 acres where minimal development is permitted. *Id; see also* N.J. Pinelands Comm'n, *A Summary of the New Jersey Pinelands Comprehensive Management Plan*, http://www.nj.gov/pinelands/cmp.htm (last updated Nov. 16, 2004); N.J. Pinelands Comm'n, *Highlights of the Pinelands, Size*, http://www.nj.gov./pinelands/pnrpc.htm (last updated Nov. 16, 2004).

Moreover, the State of New Jersey protects its environmentally-sensitive coastal waters and the nearby land pursuant to the Waterfront Development Law, *N.J. Stat. Ann.* § 12:5-3 (West 1979 & Supp. 2004), *et. seq*., the Wetlands Act of 1970, *N.J. Stat. Ann.* § 13:9A-1 (West 2003), *et seq*., and the Coastal Area Facility Review Act, *N.J. Stat. Ann.* § 13:19-1 (West 2003), *et seq*. The land area regulated by the Coastal Area Facility Review Act alone consists of 880,640 acres, approximately 18.3 % of the land within the State. *See In re Egg Harbor Assocs*., 464 A.2d 1115, 1120-21 (N.J. 1983). The State's Department of Environmental Protection

regulates development in these areas pursuant to the New Jersey Coastal Permit Program rules, *N.J. Admin. Code. tit.* 7, § 7 (2004) and the Coastal Zone Management Rules, *N.J. Admin. Code. tit.* 7, § 7E (2004).

There are a variety of other statutes that regulate and restrict development in environmentally-sensitive areas of New Jersey. *See e.g.* Freshwater Wetlands Protection Act, *N.J. Stat. Ann.* § 13:9B-1 (West 2003), *et seq*.; Hackensack Meadowlands Reclamation and Development Act, *N.J. Stat. Ann.* § 13:17-1 (West 2003), *et seq*.

In summary, much of the undeveloped land in New Jersey is environmentally sensitive, and the State has acted to protect the public health, safety and welfare by restricting and regulating development in these areas.

E. New Jersey has adopted a "Smart Growth" Policy for Future Development.

In response to a growing population and environmental constraints on much of the State's undeveloped land, New Jersey has adopted a policy of promoting "smart growth," a term used to describe planned and managed growth that adds new homes and creates new jobs, while preserving open space, farmland and environmental resources. In 1985, the Legislature enacted the State Planning Act, finding that:

> a. New Jersey, the nation's most densely populated State, requires sound and integrated Statewide planning and the coordination of Statewide planning with

> local and regional planning in order to conserve its natural resources, revitalize its urban centers, protect the quality of its environment, and provide needed housing and adequate public services at a reasonable costs while promoting beneficial economic growth, development and renewal; . . .

N.J. Stat. Ann. § 52:18A-196 (a) (West 2001 & Supp. 2004). The State Planning Act established the State Planning Commission, and directed that it prepare a "State Development and Redevelopment Plan designed for use as a tool for assessing suitable locations for infrastructure, housing, economic growth and conservation[.]" *N.J. Stat. Ann.* § 52:18A-196 (c) (West 2001 & Supp. 2004).

The Legislature has also declared that:

> d. It is in the public interest to encourage development, redevelopment and economic growth in locations that are well situated with respect to present or anticipated public services and facilities, giving appropriate priority to the redevelopment, repair, rehabilitation or replacement of existing facilities and to discourage development where it may impair or destroy natural resources or environmental qualities that are vital to the health and well-being of the present and future citizens of the State; . . .

N.J. Stat. Ann. § 52:18A-196(d) (West 2001 & Supp. 2004). The State Development and Redevelopment Plan encompasses the State's land use and development policies, and is intended to promote economic growth, urban revitalization, adequate housing and transportation, agricultural promotion and preservation, and preservation of natural, environmental, historical and cultural resources. The "smart growth" policy is intended to ensure that "all of New Jersey's citizens benefit from growth, development and redevelopment." *N.J. Stat. Ann.* § 52:18A-196 (g) (West 2001 & Supp. 2004).

Most recently, the Legislature enacted the Smart Growth Law, *N.J. Stat. Ann.* § 13:1D-145 (West, WESTLAW through L.2004, c. 1 to 155), *et seq.*, which establishes a variety of policies and procedures to facilitate development in the "smart growth" areas. For example, the law requires that the State's Departments of Environmental Protection and Transportation expeditiously review applications for development permits in "smart growth" areas. *N.J. Stat. Ann.* § 13:1D-146a (West, WESTLAW through L.2004, c. 1 to 155). The Law defines a "smart growth" area as an area designated by the State Development and Redevelopment Plan as a Metropolitan or Suburban Planning Area. These areas include the State's existing urban and older suburban areas. "Smart growth" areas also include designated growth centers, an "area[s] in need of redevelopment" pursuant to Local Redevelopment and Housing Law, *infra*, a regional growth areas designated in the management plan prepared and adopted by the Pinelands Commission, and various other designated areas. *N.J. Stat. Ann.* § 13:1D-144 (West, WESTLAW through L.2004, c. 1 to 155).

F. The Local Redevelopment and Housing Law Enables Municipalities to Identify Areas in Need of Redevelopment, Promulgate Plans to Redevelop Those Areas and, When Necessary, Exercise Eminent Domain to Accomplish These Plans.

The New Jersey Legislature has enacted the Local Redevelopment and Housing Law ("LRHL") to promote the policy of "smart growth." *N.J. Stat. Ann.* § 40A: 12A-1 (West 1993 & Supp. 2004), *et seq.* The Legislature determined that:

> a. There exist, have existed and persist in various communities of this State conditions of deterioration in housing, commercial and industrial installations, public services and facilities and other physical components and supports of community life, and improper, or lack of proper, development which result from forces which are amendable to correction and amelioration by concerted effort of responsible public bodies, and without this public effort are not likely to be corrected or ameliorated by private effort. . . .

N.J. Stat. Ann. § 40: 12A-2 (West 1993 & Supp. 2004). The goals of the LRHL are to cease the deterioration of housing, commercial and industrial facilities through redevelopment at the local level.

The Legislature has designated the criteria and procedural safeguards for designating an "area in need of redevelopment." *N.J. Stat. Ann.* § 40A:12A-5 (West 1993 & Supp. 2004) in part states:

> A delineated area may be determined to be in need of redevelopment if, after investigation, notice and hearing as provided in [*N.J. Stat. Ann.*] 40A:12A-6[] [(West 1993 & Supp. 2004)], the governing body of the municipality by resolution concludes that within the delineated area any of the following conditions is found: . . .

The LRHL then goes on to describe a variety of conditions that undoubtedly fall within any common understanding of a "blighted" or "slum" area, including a "generality of buildings [that] are substandard, unsafe, unsanitary, dilapidated, or obsolescent, . . ."; buildings with "unwholesome living or working conditions"; areas where buildings are abandoned or are in "so great a state of despair as to be untentantable"; and areas "with buildings or improvements which. . . are detrimental to the safety, health, morals, or welfare of the community." *N.J. Stat. Ann.* 40A:12A-5a, b, d (West 1993 & Supp. 2004).

Yet an "area in need of redevelopment" need not be limited to a narrow finding of blight, but, rather, may include areas where:

> e. A growing lack or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein or other conditions, resulting in a stagnant or not fully productive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.
>
> . . . .
>
> h. The designation of the delineated area is consistent with smart growth planning principals adopted pursuant to law or regulation.

N.J. Stat. Ann. § 40A:12A-5e, h (West 1993 & Supp. 2004). Moreover, the LRHL provides that an "area in need of redevelopment" or "redevelopment area" "may include lands, buildings, or improvements which of themselves are not detrimental to the public health, safety or welfare, but the inclusion of which is found necessary, with or without change in their condition, for the effective redevelopment of the area of which they are a part." *N.J. Stat. Ann.* § 40A:12A-3 (West 1993); *see Hirth v. City of Hoboken*, 766 A. 2d 803, 809 (N.J. Super. Ct. App. Div. 2001).

Thus, New Jersey Courts have held that "an area in need of redevelopment" as defined in the LRHL is synonymous with the term "blighted area" as used in the State Constitution, N.J. Const. of 1947, art. VIII, §3, ¶1 (1963), which provides authority for the LRHL. *Concerned Citizens of Princeton, Inc. v. Borough of Princeton*, 851 A.2d 685, 689 (N.J. Super.

Ct. App. Div. 2004); *see also N.J. Stat. Ann.* § 40A:12A-6(c) (West 1993 & Supp. 2004). Yet the Supreme Court of New Jersey has recognized that the State's redevelopment law "'goes far beyond the elimination of the perceptually offensive slums'" and "an area does not have to be a slum to make its redevelopment a public use...." *Levin v. Township Comm. of Tp. of Bridgewater*, 274 A.2d 1, 5 (N.J.), *appeal dismissed*, 404 U.S. 803 (1971) (quoting *Jersey City Chapter of Prop. Owner's Protective Ass'n v. City Council of Jersey City*, 259 A.2d 698, 704-05 (N.J. 1969) (pre-LRHL case)); *see also Concerned Citizens of Princeton, Inc., supra*, 851 A.2d at 700.

Even prior to the enactment of LRHL, the policy of New Jersey revealed a broad objective of redevelopment as benefiting the general community. *Concerned Citizens of Princeton, Inc., supra*, 851 A.2d at 703. "[S]pecifically, the Legislature recognized that at times, usually over a long period, potentially useful land reaches a stage of stagnation and unproductiveness . . . ." *Levin, supra*, 274 A.2d at 18-19; *see also Forbes v. Township of S. Orange Vill.*, 712 A.2d 255, 258-59 (N.J. Super. Ct. App. Div.), *certif. den.*, 719 A.2d 642 (N.J. 1998). The New Jersey Legislature determined that the total "unproductivity of unimproved vacant lot and commercial blight embraced not only economic deterioration in tax revenues but also all the adverse physical conditions of the property that individually or in combination impeded its reasonable productivity and resulted in its negative impact upon the general welfare and economic well-being of the community." *Forbes, supra*, 712 A.2d at 258-59. The New Jersey Legislature sought to encompass a broad range of circumstances that will determine when an "area is in need of

redevelopment." Even "[t]he relative affluence of a municipality or its residents is irrelevant in that calculus as long as the determination that an area is in need of redevelopment" met the statutory factors and was supported by substantial credible evidence. *Concerned Citizens of Princeton, Inc., supra*, 851 A.2d at 699.

New Jersey's LRHL includes substantive and procedural safeguards to protect those who may be affected by the designation of an area as one in need of redevelopment. The municipality must conduct a preliminary investigation, followed by a public hearing with the requisite public notice pursuant to *N.J. Stat. Ann.* § 40A:12A-6 (West 1993 & Supp. 2004), prior to making a determination that an "area is in need of redevelopment." *N.J. Stat. Ann.* § 40A:12A-5, -6 (West 1993 & Supp. 2004). The requirements of public notice must be satisfied for a determination that an "area is in need of redevelopment." *See Concerned Citizens of Princeton, Inc.*, 851 A.2d at 709-11. At the public hearing, the municipality or governing body receives written or oral objections. *N.J. Stat. Ann.* § 40A:12A-6(b) (5) (West 1993 & Supp. 2004). A redevelopment plan must be drawn in accordance with all of the statutory requirements. *N.J. Stat. Ann.* § 40A:12A-7 (West 1993 & Supp. 2004).

A municipal government's finding that an "area is in need of redevelopment" is subject to judicial review, and such a determination will be upheld where the determination is "supported by substantial evidence," and is not "arbitrary, capricious or contrary to law." *N.J. Stat. Ann.* § 40A:12A-6 (b) (5) (West 1993 & Supp. 2004); *Concerned Citizens of*

Princeton, Inc., supra, 851 A.2d at 700 (quoting *Lyons v. City of Camden*, 243 A.2d 817 (N.J. 1968)).

After the redevelopment plan has been adopted by the governing body, the plan can be implemented by contracting with private parties for the development and construction of the redevelopment project. *N.J. Stat. Ann.* § 40A:12A-8 (f) (West 1993 & Supp. 2004). When the designated developer is unable to acquire land in the redevelopment area by purchase, the municipality may acquire the land through eminent domain and convey it to the private redeveloper. *N.J. Stat. Ann.* § 40A:12A-8 (c).

In summary, as a small, densely populated State with a growing population and limited availability of undeveloped land suitable for development, planned redevelopment is essential to the New Jersey's policy of "smart growth." To provide a growing population with shelter, jobs, and other economic opportunities, the public interest mandates that New Jersey use available land and infrastructure in a fully productive manner. New Jersey cannot permit such land to remain in a stagnated, unproductive or underproductive condition, while the population and needs of the citizens of the State are growing. Accordingly, the designation of an area as one in need of redevelopment is not limited to situations where there is an immediate public benefit in elimination of blighted conditions, but, rather, focuses on the benefits that the redevelopment of an area will provide to the public at large.

G. This Court Should Reject a Narrow "Elimination of Blight" Standard for Determining Whether and When the Fifth Amendment Allows the Use of Condemnation for Private Economic Development.

This Court has held that it is for the Legislature to determine the public purpose served by the exercise of eminent domain. In *Berman v. Parker*, 348 U.S. 26 (1954), the Court upheld the District of Columbia Redevelopment Act of 1945. The Act provided for the use of eminent domain power to redevelop slums for aesthetic considerations and health considerations. When determining whether the use was a "public use," the Court stated:

> We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such case the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress

> legislating concerning the District of Columbia or the States legislating concerning local affairs. This principle admits no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether the power is being exercised for a public purpose is an extremely narrow one.

Id. at 32; *see also Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 239-41 (1984) (citations omitted) (upholding Hawaii Land Reform Act of 1967 as "public use" under the Fifth Amendment of the Constitution for the taking of private property). Furthermore, this Court has held that once the Legislature has declared the public purpose, all other aspects of effecting that purpose rest in the discretion of the legislative branch. The exercise of eminent domain must be "rationally related" to the conceivable public purpose. *Berman, supra*, 348 U.S. at 33-36; *Haw. Housing Auth., supra*, 467 U.S. at 240-41.

This Court should reject an overly narrow "elimination of blight" standard for determining whether and when the use of eminent domain for "private economic development" satisfies the public use requirement of the Takings Clause of the Fifth Amendment, for reasons illustrated by New Jersey's efforts to address essential public needs. New Jersey is the most densely populated State in the nation. Due to environmental constraints, New Jersey has a limited availability of undeveloped land to address the needs of the growing population, such as housing, employment and the protection of the fragile environmental resources. New Jersey has adopted a policy of

"smart growth" which encourages addressing these public needs, while also providing for the conservation of natural and environmental resources by promoting development and redevelopment in areas already developed and in areas without significant environmental constraints. The New Jersey Local Redevelopment and Housing Law addresses the public needs of the State, by allowing municipalities to designate areas in need of redevelopment, create plans for the designated redevelopment areas, and by encouraging private parties to implement these redevelopment plans. The public needs of a state such as New Jersey require going beyond a narrow "elimination of blight," standard. Rather, in appropriate circumstances condemnation for "private economic development" serves to provide essential public needs and thus readily satisfies the public purpose requirement of the Takings Clause.

CONCLUSION

For the foregoing reasons, this Court should reject a narrow interpretation of the "public use" requirement of the Takings Clause of the Fifth Amendment to the Constitution.

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Respectfully submitted,

PAUL H. SCHNEIDER
Counsel of Record
AFIYFA H. BOLTON

GIORDANO, HALLERAN & CIESLA, P.C.
125 Half Mile Road, P.O. Box 190
Middletown, N.J. 07748
(732) 741-3900